

#### ***4 Official Opinions of the Compliance Board 12 (2004)***

**LEGISLATIVE FUNCTION – DISCUSSION BY TOWN COUNCIL OF  
GENERAL ASSEMBLY BILL TO AUTHORIZE COUNTY TAX, HELD  
OUTSIDE THIS FUNCTION. – DISCUSSION BY COUNTY COUNCIL  
OF GENERAL ASSEMBLY BILL TO AUTHORIZE COUNTY TAX,  
HELD WITHIN THIS FUNCTION . – EXECUTIVE FUNCTION –  
DISCUSSION BY TOWN COUNCIL OF GENERAL ASSEMBLY BILL  
TO AUTHORIZE COUNTY TAX, HELD OUTSIDE THIS FUNCTION.  
– NOTICE – TIMING – NOTICE GIVEN SOON AFTER  
SCHEDULING OF MEETING FOR NEXT DAY IS LAWFUL**

February 6, 2004

*The Honorable Moonyene Jackson-Amis  
Easton Town Council Member*

The Open Meetings Compliance Board has considered your complaint that the Easton Town Council and the Talbot County Council violated the Open Meetings Act with respect to certain meetings at which a bill then pending in the Maryland General Assembly, House Bill 701 of 2003, was discussed. For the reasons stated below, we conclude as follows about each meeting addressed in the complaint: The Open Meetings Act applied to the Easton Town Council's meeting on March 3, 2003, and the discussion of House Bill 701 violated the Act. The Open Meetings Act applied to the Talbot County Council's meeting on March 4, 2003, but the discussion of House Bill 701 did not violate the Act. The Open Meetings Act did not apply to the discussion of House Bill 701 by members of the Talbot County Council on March 5, 2003. Finally, the Easton Town Council did not violate the Act in its giving of notice for a meeting on March 6, 2003.

## **I**

### **Background**

#### ***A. Underlying Tax Issue***

In 2001, the Talbot County Council decided to seek enabling legislation from the General Assembly to authorize the County to impose a building excise tax. As the Talbot County Attorney has summarized the law, in a letter

to the Compliance Board dated April 3, 2003,<sup>1</sup> “Before any county can impose a tax, including a building excise tax, the General Assembly must delegate the power by enabling legislation. Enabling legislation is only the first part of the process. If, and after, the General Assembly adopts enabling legislation, the county is then authorized to adopt a local ordinance to establish a building excise tax.” On December 16, 2002, the Talbot County Council met with three legislators to discuss the then-forthcoming 2003 session of the General Assembly. The Council reiterated its request for enabling legislation. On January 2, 2003, the Talbot County Attorney sent Delegate Kenneth Schisler a proposed bill. This proposal was drafted broadly, to give Talbot County the greatest degree of flexibility in ultimately enacting a building excise tax ordinance. Later in January, Delegates Schisler and Eckardt introduced House Bill 701, the enabling legislation. The bill as introduced differed in various ways from that suggested by the Talbot County Attorney. Subsequently, the bill was amended in various other ways, some of which will be discussed below, and ultimately enacted into law.<sup>2</sup>

### ***B. History of this Complaint***

This complaint was originally filed by letter dated March 12, 2003. Both the Easton Town Council and the Talbot County Council submitted timely responses to the complaint, in which they denied that the Act had been violated.<sup>3</sup> While the Compliance Board was considering the matter, before issuance of an opinion, the Compliance Board received a letter dated April 15, 2003, from Stuart O. Simms, Esquire, newly engaged as counsel to Ms. Jackson-Amis. Mr. Simms requested an opportunity to review the matter and supplement the complaint with additional information. By letter dated November 21, 2003, Mr. Simms did so. Both councils responded in a timely way to the expanded complaint.<sup>4</sup> This opinion is based on the information in the original and expanded complaint and all of the responses from the two councils.

---

<sup>1</sup> The somewhat complicated procedural history of this matter is recounted in Part IB below.

<sup>2</sup> The bill, as amended, was enacted as Chapter 48 of the Laws of Maryland 2003.

<sup>3</sup> The County Council’s response was by letter from County Attorney Michael L. Pullen, dated April 3, 2003. The Town Council’s response was by letter from Town Attorney Christopher B. Kehoe, dated April 11, 2003.

<sup>4</sup> The County Council’s supplemental response was by letter from the County Attorney, dated December 26, 2003. The Town Council’s supplemental response was by letter from the Town Attorney, dated December 30, 2003.

***C. Scope of this Opinion***

This opinion only addresses issues under the Open Meetings Act, for that is the jurisdictional limit of the Compliance Board. The opinion will not address certain matters of dispute between the complainant and the public bodies that are laid out in the complaint and the responses. For example, the materials reflect differences of opinion about the policy merits of House Bill 701, as introduced and amended; of course, we express no views on the merits of the bill. Moreover, we do not address the question, debated between the complainant and the County Council, whether the County Council sufficiently consulted with municipalities in Talbot County during the process leading up to the introduction of House Bill 701 and during the bill's consideration by the General Assembly. This issue, not involving any aspect of the Open Meetings Act, is immaterial to the Compliance Board's consideration of the complaint.

**II****Inapplicability of the Act to March 5 Telephone Conversation**

Before turning to more complex issues, we consider one contention in the complaint that can be readily resolved. According to the newspaper account submitted with the complaint, Delegate Schisler, co-sponsor of House Bill 701, called the Talbot County manager to arrange a meeting to discuss the bill. The call was put through to Council President Duncan and then put on the speaker phone with enough other members of the Council present to constitute a quorum. However, according to the article, Delegate Schisler indicated that he was concerned about whether discussion of the bill in this manner would be consistent with the Open Meetings Act. At this point two members of the Council left the room, thus negating a quorum. The complaint characterized this as "maneuvers to avoid the Act's requirements."

In response, the County Council contended that the prompt action on the part of two Councilmembers to leave the meeting, once Delegate Schisler expressed concerns about Open Meetings compliance, rendered the Act inapplicable to any subsequent discussion among those remaining in the room.

The Compliance Board agrees. The Act applied only to the extent that the Talbot County Council held a meeting – that is, "convene[d] a quorum ... for

the consideration of transaction of public business.” §10-502(g).<sup>5</sup> Without a quorum, there was no meeting to which the Open Meetings Act applied.

### **III**

#### **Applicability of the Act to Discussion of House Bill 701: Introduction**

The most difficult issue raised by the complaint is whether the Open Meetings Act applies to a discussion by a public body (here, the Easton Town Council and the Talbot County Council) of proposed legislation (here, House Bill 701) under consideration by *a different* public body (here, the Ways and Means Committee of the Maryland House of Delegates). It hardly needs saying that the entire process by which a public body considers *its own* legislative proposals is subject to the Act. But when a public body is in the role of proponent (or opponent) of legislation, rather than decision maker about it, does the Act apply?

We have not previously considered this issue. The complainant urged that we declare the discussions by the two councils about House Bill 701 to have been a legislative function subject to the Act. The two councils urged us to hold that these discussions did not involve a legislative function but instead were an executive function excluded from the Act.

This issue requires us to consider two key definitions in the Act, which we set out here as preface to our analysis of how the definitions apply to the meetings in question. The term “legislative function” is defined, in relevant part, as “the process or act of ... approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy.” §10-502(f)(1). The term “executive function” is defined as “the administration of” a State or local law; if a matter is a legislative function, it cannot be an executive function. §10-502(d).

---

<sup>5</sup> All statutory references in this opinion are to the State Government Article, Maryland Code.

**IV**

**Discussion of House Bill 701: Town Council Meeting of March 3**

***A. Complaint***

At its meeting on March 3, 2003, the Easton Town Council closed the session to obtain legal advice concerning a public works project.<sup>6</sup> While the Council was in closed session, according to the complaint, “the Town Council President initiated discussion concerning a request he received from Hilary Spence, a member of the Talbot County Council. The request was that the Easton Town Council ‘support’ HB 701 then pending before the Ways and Means Committee of the Maryland House of Delegates.”

Over the objections of Ms. Jackson-Amis, the complaint continued, “considerable debate” occurred, including a discussion of the process of consultation with the municipalities within Talbot County and “the permissible scope of enabling legislation the possible implications to the Town of County imposed excise tax versus impact fees. Council for the Town did specify possible options for the Town Council to respond to the County’s request for a position on the legislation.” The complaint asserted that the Council “then proceeded to vote on the question on whether to support the legislation” and agreed to do so, with Ms. Jackson-Amis dissenting. The complaint characterized the discussion as an aspect of policy making, and, hence, as a “legislative function” subject to the Open Meetings Act that was unlawfully conducted in closed session.

***B. Town Council’s Response***

The Town Attorney argued that the process by which the Council tentatively decided on a position about House Bill 701 was an “executive function” not subject to the Act, rather than a legislative function: “The issue confronting the Town Council President was whether or not to write a letter to a member of the General Assembly. Writing such a letter was a single, discrete act which would require no further action on the part of the Town or its officials. Deciding whether or not such a letter was appropriate was not ‘setting new policy.’ Instead, such discussions fall into the category of the administration of the Town’s affairs. The Town Charter identifies such functions as executive in nature.”

---

<sup>6</sup> The complaint did not object to this basis for closing the session or the procedures followed to do so.

The Town Attorney further contended that the closed-session discussion was permissible because it “involved consultation with legal counsel. When the discussion strayed from that area, Ms. Jackson-Amis quite properly called this to the attention to the Council generally and to me in particular. At that point, all discussion of the Council’s position on House Bill 701 ended and, for all practical purposes, the meeting adjourned.”

***C. Analysis***

A public body performs a legislative function when it is engaged in “the process or act of ... approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy.” §10-502(f)(1). The “process or act” involved here was the sending of a letter to the House Ways and Means Committee, expressing support for a bill pending before the committee. Obviously, the Easton Town Council was not “approving ... a law” when it decided to send the letter. Was it “approving ... [an] other measure to set public policy”?

We think not. Although the phrase “measure to set public policy” is undefined in the Act, in context the words used imply an action that, like enacting a law, itself has public policy consequences. The word “set” means to determine, resolve, or decide upon. *Random House Dictionary of the English Language* 1751 (unabridged 2d ed. 1987). A “measure,” in this context, means a legislative enactment of some kind. *Id.* at 1192. The wording of the definition, in short, suggests a cause and effect relationship: the law or other similar measure acted upon potentially has a determinative effect upon some desired public policy outcome.

That is not the case here. The Easton Town Council was not the public body considering House Bill 701; the House Ways and Means Committee was. Moreover, House Bill 701 would give no power to the Easton Town Council. Instead, the bill was an authorization for the Talbot County Council to enact a tax. Of course, Easton would be affected by the enactment of House Bill 701 or at least by the ultimate manifestation of the bill, a tax ordinance by the County Council. But the same could be said for developers, land owners, and many others. The Council’s expression of an opinion about House Bill 701 was not a “legislative function.”

Was it then, as the Town Attorney contended, an executive function? For an activity to fall within the executive function exclusion from the Act, the activity must involve “the administration of” existing law or policy. We do not discern how the Town Council’s expression of an opinion in support of a bill pending in the General Assembly is the administration of existing law. The

only current law cited by the Town Council is a charter provision that designates the Mayor as the Chief Executive Officer of the Town, “responsible for the administration of the Town’s affairs to the Council and to the voters of the Town.” Easton Town Charter, Article III, §4(a). The Council was not administering this law.

The Town Council cited several prior opinions of the Compliance Board in which we held that the expression of views by a public body about some other entity’s possible action constituted an executive function. These prior opinions, however, are distinguishable. They involved situations in which the public body’s administration of its existing responsibilities would be directly impacted by the action of the other entity. None involved the expression of views by a public body on a legislative proposal pending before another public body.<sup>7</sup>

In our opinion, the Town Council’s discussion on House Bill 701 was *neither* a legislative function *nor* an executive function.<sup>8</sup> Rather, the Town Council’s discussion about legislation pending before the General Assembly fits into none of the definitions in the Act. Because a topic of discussion that is not encompassed by any of the Act’s defined functions is covered by the Act, the Act applied to the Town Council’s March 3 session.<sup>9</sup>

Having concluded that the Act applied to the session, we next consider whether the Act was violated. We accept the Town Attorney’s contention that some of the discussion involved his legal advice about the “implications of a County imposed building excise tax on the Town’s ability to assess impact fees

---

<sup>7</sup> For example, Compliance Board Opinion No. 93-2 (January 7, 1993), *reprinted in 1 Official Opinions of the Open Meetings Compliance Board* 23, involved a public body’s participation in a discussion about a second public body’s implementation of budget cuts under an already approved budget, not the second public body’s adoption of new legislation. Similarly, Compliance Board Opinion No. 97-2 (March 3, 1997), *reprinted in 1 Official Opinions of the Open Meetings Compliance Board* 206, we held that the executive function exclusion applied to a school board’s participation in a discussion of how a board of county commissioners would implement State legislation that had already been enacted and that would affect the application of the commissioners’ budgeting process to the school board’s budget request.

<sup>8</sup> There is no contention that the Town Council was engaged in an advisory function as defined in §10-502(b).

<sup>9</sup> For the proposition that discussions not within a defined function are covered by the Act, *see* Compliance Board Opinion No. 03-14 (July 24, 2003); Compliance Board Opinion No. 94-7 (August 16, 1994), *reprinted in 1 Official Opinions of the Open Meetings Compliance Board* 96.

or related exactions, the relationship of enabling legislation to local ordinances and the differences of excise taxes and impact fees. These were clearly legal issues and clearly within the scope of permissible closed sessions.” The problem with this argument is two-fold. First, there is no indication that the written statement prepared prior to the closing of the session indicated that a topic in the closed session would be legal advice about the effect of House Bill 701. *See* §10-508(d)(2)(ii). The public is entitled to know the intended topics to be discussed in a closed session so that an objection to the closing may be lodged. §10-508(d)(3). A public body may not close a session for one purpose and then, while in closed session, take up an entirely different and unrelated matter, even if the second topic is one that itself permissibly may be discussed in closed session.

The second problem is that the discussion, in any event, exceeded the bounds of the exception permitting closed-session discussion of consultation with counsel to obtain legal advice. §10-508(a)(7). It may be, as the Town Attorney contended, that awareness of Open Meetings Act issues curtailed the discussion on March 3 and led to the scheduling of another, and open, session on March 6. Nevertheless, while in closed session, the Town Council took what amounted to a tentative vote to support House Bill 701. This expression of an opinion about the merits of the bill exceeded the bounds of the legal advice exception.

Consequently, the Compliance Board finds that the Easton Town Council violated the Open Meetings Act in its closed session on March 3.

## V

### **Discussion of House Bill 701: County Council Meeting of March 4**

#### ***A. Nature of Meeting***

The complaint itself had little specific information about the meeting, because Ms. Jackson-Amis was not a participant and was obliged to rely on newspaper accounts. The County Council’s response, however, contained much helpful detail and, together with the press accounts, provided a sufficient basis for the Compliance Board’s analysis and conclusions.

During the course of its session on March 4 to discuss preliminary budget matters, “Council President Thomas G. Duncan received an unscheduled and unanticipated telephone call from Delegate Bennett Bozman” regarding House Bill 701. Delegate Bozman was a member of the legislative committee



considering the bill. In essence, Delegate Bozman conveyed the message that the committee vote on the bill was upcoming shortly and that the bill in its present form would not likely be approved. The Council discussed the matter briefly and agreed on a response to Delegate Bozman, sent that same day. The letter to Delegate Bozman begins as follows: “The Talbot County Council met this afternoon and recommends that HB 701 be amended to include a cap on the excise tax of \$9700 per residential dwelling unit, indexed annually for inflation.”

### ***B. County Council’s Response***

The County Attorney argued, like the Town Attorney, that the County Council was not engaged in a legislative function when it discussed what amendment to House Bill 701 to suggest to Delegate Bowman: “The Council had no legislative power concerning HB 701. The Council was fully aware of the limitations of its own power.” Essentially, the argument is that when, on March 4 and at other times in the process, the County Council discussed changes to the bill, it was “merely a constituent concerning HB 701 – not a legislator.”

The County Council further argued that the discussion leading to this letter was an executive function: “Talbot County’s Charter requires a capital budget which identifies the source of funds for capital projects. Enabling legislation to authorize the Council to adopt a building excise tax to fund certain infrastructure improvements is part of the preliminary budget process excluded from the Act as an executive function.”

### ***C. Analysis***

We agree with the proposition that, in a county where the commissioners or county council carries out the dual role of both preparing and approving the budget, the preparation phase is an executive function. *See Board of County Comm’rs v. Landmark Community Newspapers*, 293 Md. 595 (1982). *See also, e.g.*, Compliance Board Opinion No. 97-7 (May 13, 1997), *reprinted in 1 Official Opinions of the Open Meetings Compliance Board* 227. Further, discussing the potential fiscal impact of pending State legislation might often be a legitimate part of budget preparation. At the same time, not every discussion about future sources of revenue is an executive function merely because it can be linked to budget preparation. To take an obvious example, a discussion of amending a county ordinance to raise water and sewer rates would be a legislative function, not an executive function. Compliance Board Opinion No. 02-9 (July 1, 2002).

The County's position, however, is that, because it was the General Assembly, not the County Council, that would decide whether to pass House Bill 701 and how to amend it, the County Council was not engaged in a legislative function when it commented on the bill to Delegate Bozman. In other words, the County Council urged us to reach the same conclusion that we have reached about the Town Council: the council's role was so divorced from the exercise of legislative power by the General Assembly that it was not – indeed, could not be – engaged in a legislative function.

This position, in our opinion, reflects an unrealistic view of the process by which Talbot County would enact a building excise tax. The process begins with the County Council's request for authorizing legislation, continues with the General Assembly's consideration of that request and amendments to it, includes the Governor's decision whether to sign the authorization bill, and concludes (the bill having been enacted) with the County Council's enactment of an ordinance as thus authorized. It is, of course, true that the County Council does not have control over all aspects of this process. It decided what to ask for, and it will decide on what ordinance to enact within the confines of the authorizing legislation, but the State legislative process is the decision making prerogative of others, not the County Council. Nevertheless, State authorizing legislation is, as the County Attorney stated, "the first part of the process" by which the Talbot County Council ultimately will establish this new tax. The Act applies, the Court of Appeals has said, "not only to final decisions made by the public body exercising legislative functions at a public meeting, but as well as to all deliberations which precede the actual legislative act or decision ...." *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980).

Whether House Bill 701 was enacted, and what its contents turned out to be, were very much a part of the process by which the Talbot County Council could eventually enact a building excise tax ordinance. It is unrealistic to think otherwise. Consequently, the Council's deliberations on March 4 with respect to House Bill 701 are rightly deemed a legislative function subject to the Act.

Having concluded that the Act applied to the March 4 session, we turn to the question whether the Act was violated. The materials available to us indicate that the meeting, a "budget workshop," was open. The meeting was so described in an article on March 16, 2003, in the *Easton Star-Democrat*. The Open Meetings Act does not require notice to the public of the anticipated topics of discussion at an open meeting, nor does it limit in any way the matters that can be discussed. Hence, there was no violation arising from the discussion following Delegate Bozman's unexpected call.

**VI**

**Alleged Notice Violation: Town Council Meeting of March 6**

The March 6 meeting to discuss House Bill 701 was open to the public. The only issue is the timing of the meeting notice.<sup>10</sup> The complaint pointed out that the notice of the March 6 meeting was given to the public on March 5. This short period of notice, the complaint contended, was unfair and unreasonable, because “the truncated timing of the notice in light of the considerable advanced debate of the legislation virtually eliminated consideration and opportunity for public input and review of the Council’s position.” The Town Council responded that notice on March 5 was reasonable because that was when the meeting for March 6 was scheduled: “On Tuesday March 5, the Town Clerk contacted the County Manager and was told that the deadline for comment on the legislation was March 7. He informed the President of this fact and the President instructed the Town Clerk to schedule a special meeting of the Council for Thursday, March 6 at 5:30 p.m.”

The Open Meetings Act prescribes no specific time period by which notice of the future meeting must be given to the public. Instead, the Act simply requires “reasonable advance notice” of a meeting. §10-506(a). In the case of a previously unanticipated meeting that is scheduled on short notice, the Act’s “reasonableness” requirement is satisfied if the public body notifies the public promptly after the meeting time is confirmed. Compliance Board Opinion No. 98-3 (May 12, 1998), *reprinted in 2 Official Opinions of the Open Meetings Compliance Board* 11. *See also, e.g.,* Compliance Board Opinion No. 93-7 (June 22, 1993), *reprinted in 1 Official Opinions of the Open Meetings Compliance Board* 38.

This criterion was satisfied here. Public notice was provided on the same day that the meeting was scheduled. There was no violation.

---

<sup>10</sup> In his supplement to the original complaint, Mr. Simms argued “that the March 6, 2003 meeting was illegal per se. Any second meeting following the first by several days should be given strict scrutiny by the Board. The sole purpose of the March 6 follow-up meeting was to attempt to rectify a violation of the Act which had occurred on March 3 ....” Even if this characterization were correct, it is immaterial to the legality of the March 6 meeting.

**VII**

**Conclusion**

In summary, the Open Meetings Compliance Board finds that the Open Meetings Act applied to, and was violated by, the conduct of the Easton Town Council's meeting on March 3, 2003. The Compliance Board finds no other violations as to the matters raised in the complaint.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.  
Courtney McKeldin  
Tyler G. Webb